No. 96-210

In The

Supreme Court of the United States

October Term, 1995

CAN DO, INC. PENSION AND PROFIT SHARING PLAN AND SUCCESSOR PLANS, INDIVIDUALLY AND AS A TRUSTEE FOR GEORGE W. HOLDER, JR.,

Petitioner,

vs.

MANIER, HEROD, HOLLABAUGH & SMITH, a professional corporation, and C. KINIAN COSNER, JR.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THIS PROCEEDING

The only Respondents before the Court are Manier, Herod, Hollabaugh & Smith, a professional corporation, and C. Kinian Cosner, Jr. The Petition for Writ of Certiorari incorrectly identifies H. Rowan Leathers, III as a Respondent. The Petitioner's claim against H. Rowan Leathers, III was dismissed by the decision of the Tennessee Court of Appeals dated October 19, 1994. (Petition at Appendix 58 n.1, 64). The claim against Mr. Leathers was dismissed because that particular claim was not included in the assignment which purportedly conveyed George W. Holder, Jr.'s legal malpractice claim to the Petitioner. In the Tennessee Supreme Court, the Petitioner did not seek review of the dismissal of the case against H. Rowan Leathers, III, and the Tennessee Supreme Court did not reverse that portion of the Court of Appeals' decision. Because the dismissal of H. Rowan Leathers, III was not appealed to the Tennessee Supreme Court, he is no longer a party to this case.

The Respondent Manier, Herod, Hollabaugh & Smith is a wholly-owned professional corporation without any subsidiaries or parent companies.

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The Respondents, Manier, Herod, Hollabaugh & Smith, P.C. and C. Kinian Cosner, Jr., submit the following brief demonstrating why the Court should deny the Petition for Writ of Certiorari seeking review of the decision of the Tennessee Supreme Court.

STATEMENT OF JURISDICTION

Because the Petitioner failed to raise any federal questions in the Tennessee courts, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257. Supreme Court Rule 14.1(g)(i) requires a Petitioner to refer specifically to those portions of the state court record where the federal question sought to be reviewed "was timely and properly raised. . . . " The Petition omits the specific citations required by this Rule for the simple reason that none of the issues now raised by the Petitioner was ever presented to or decided by the Tennessee courts. For the reasons discussed more fully below, at pp. 4-5, the Court lacks jurisdiction over the federal questions now advanced by the Petitioner.

STATEMENT OF THE CASE

A. Introduction

The Petitioner seeks review of the result in this case on grounds that were never presented to or decided by the Tennessee courts. This case was argued and decided below on one narrow question: Does the common law of Tennessee permit legal malpractice cases to be assigned? In deciding this issue against the Petitioner, the Tennessee courts relied exclusively on Tennessee public policy grounds, without having an opportunity to consider the federal questions belatedly advanced by the Petitioner. The Petitioner's arguments come far too late, and the Court should deny the Petition on that basis alone.

In any event, the Court should decline to review a decision of a state supreme court that is entirely consistent with existing federal law. This case simply does not present the federal Constitutional and statutory conflicts now argued by the Petitioner.

B. Course of Proceedings Below

This is a legal malpractice case which originated in a Tennessee trial court. Before 1991, the Respondent attorneys represented George W. Holder, Jr. In 1991, Mr. Holder filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Middle District of Tennessee. (Petition at 4). Under the provisions of 11 U.S.C. § 541, the filing of Mr. Holder's bankruptcy petition created an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). When Mr. Holder filed his bankruptcy petition, any causes of action against the Respondent law firm that arose before the petition was filed became property of the bankruptcy estate.

During the course of Mr. Holder's bankruptcy proceedings, a Chapter 11 Trustee was appointed by the court to administer the estate. (Petition at Appendix 18). The Trustee filed a Chapter 11 Plan which was confirmed by an order dated April 29, 1993 (Petition at Appendix 39). Neither the plan nor the order confirming the plan contained any reference whatsoever to the disposition of Mr. Holder's malpractice claim against his former attorneys. While the plan contained a general provision authorizing the Trustee to liquidate all assets and compromise all claims according to his judgment, it did not specifically provide for the disposition of Mr. Holder's malpractice claim. (Petition at Appendix 35-36).

In the course of the bankruptcy proceeding, a number of disputes arose among various parties, including the Chapter 11 Trustee, Mr. Holder, the trustee of a pension and profit sharing plan of which Mr. Holder was the beneficiary, and Mr. Holder's daughter. These disputes were resolved by an agreed order entered on May 18, 1993. (Petition at Appendix 42-53). The agreed order purported to assign "any cause of action or right to payment the bankruptcy estate may have" against Mr. Holder's former attorneys to the Can-Do, Inc. Pension and Profit Sharing Plan and its successor plans, individually and as Trustee for Mr. Holder (Petition at Appendix 48). The pension plan is the Petitioner now before the Court.

The pension plan filed the present legal malpractice action on May 25, 1993. The trial court dismissed the claim, holding that the purported assignment of the claim to the pension plan was void under Tennessee law. (Petition at Appendix 54-55). The Petitioner did not argue, and the trial court did not address, the issue of whether any federal law required the Tennessee courts to recognize the assignment. On appeal to the Tennessee Court of Appeals, the Petitioner again failed to challenge the trial court's decision on any federal grounds. Although the Tennessee Court of Appeals reversed the trial court's dismissal, it did so solely on the basis of Tennessee public policy. (Petition at Appendix 57-64). The Respondent attorneys appealed to the Tennessee Supreme Court, which reversed the Court of Appeals and held "that the public policy of this State should prohibit the assignment of legal malpractice actions . . ." (Petition at Appendix 73). The Tennessee Supreme Court's decision contains no reference to the federal statutes and constitutional provisions now cited by the Petitioner, and the Petitioner did not present those arguments to that court. Thus, the Petitioner did not assert any of the federal questions it now advances during any stage of the state court proceedings.

REASONS FOR DENYING THE WRIT

I.

BECAUSE THE PETITIONER FAILED TO RAISE ITS FEDERAL CLAIMS IN THE TENNESSEE COURTS, THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITIONER'S ARGUMENTS.

It is well-established that this Court will not review the final judgments of state courts unless a federal question has been both raised and decided in the state courts. *Yee v. City of Escondido*, 503 U.S. 519, 522-33 (1992). In *Yee*, this Court held that, in reviewing the judgments of state courts, "the Court has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." *Id.* at 533 This Court will not review the final judgment of a state court unless the record shows that the federal claims were adequately presented in the state system. *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987). *See also Webb v. Webb*, 451 U.S. 493, 496-97 (1981). If the opinion of a state court fails to pass on a federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, (1983) (quoting *Street v. New York*, 934 U.S. 576, 582 (1969)). Similarly, although Tennessee law permits appellate courts to consider any issue of law, "review generally extends only to those issues presented for review." Tennessee Rule of Appellate Procedure 13(b).

The Petitioner should not be permitted to lie in wait until this penultimate moment of the litigation before advancing the federal questions it now asks the Court to consider. The Petitioner's failure to assert any of the arguments now presented

during three levels of review by the Tennessee courts should preclude it from asserting those arguments in this Court. Although the Petitioner's new legal arguments are entirely meritless, the Court should deny the Petition on jurisdictional grounds alone.

II.

THE DECISION OF THE TENNESSEE SUPREME COURT IN THIS CASE IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE FEDERAL COURTS CITED BY THE PETITIONER.

A. Because the Tennessee Supreme Court never even referred to any federal issues in deciding this case, the court's decision does not conflict with existing federal law.

Under the longstanding rules of this Court, "a petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. One of the factors considered by this Court in ruling on a petition is whether "a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of United States Court of Appeals." Supreme Court Rule 10(b). In the present case, the Petitioner argues that its Petition should be granted because the Tennessee Supreme Court's decision somehow conflicts with the federal courts' prior interpretations of the United States Bankruptcy Code.

In fact, however, the Tennessee Supreme Court did not decide this case on the basis of any federal law and made no holdings which depended upon an interpretation of federal law. Because the Tennessee Supreme Court failed to decide any federal question, the court's decision by definition does not conflict with the various federal cases cited by the Petitioners.

B. Even accepting the Petitioner's impermissibly broad interpretation of the Tennessee Supreme Court's decision in this case, that decision does not conflict with relevant federal precedent.

It is undisputed that, when George W. Holder, Jr. filed his bankruptcy petition, the present legal malpractice claim became property of the bankruptcy estate pursuant to 11 U.S.C. § 541. A bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case . . . " 11 U.S.C. § 541(a)(1). Such interests include any causes of action possessed by the debtor at the commencement of the bankruptcy proceeding. *In re Cottrell*, 876 F.2d 540, 542-43 (6th Cir. 1989). In dismissing the Petitioner's malpractice claim, the Tennessee Supreme Court did *not* hold that the claim failed to become a part of Mr. Holder's bankruptcy estate. This case, therefore, does not present the issue of whether or not state law may properly preclude a tort claim from becoming property of the estate.

Instead, the Tennessee Supreme Court simply held that the present cause of action could not be pursued by the Petitioner, a third-party assignee who purportedly obtained ownership of the malpractice claim from the bankruptcy trustee. The Petitioner urges this Court to accept this case on the ground that the Tennessee Supreme Court's decision somehow ran afoul of the Bankruptcy Code and should therefore be reversed. The Petitioner's argument rests upon two fundamental errors, one of which is a misinterpretation of bankruptcy law, and the other of which is based on a misunderstanding of the facts of this case.

First, the Petitioner argues that the property of the estate acquired by a trustee pursuant to 11 U.S.C. § 541 may be disposed of under the authority of 11 U.S.C. § 363 without regard to any state law. This argument flies in the face of well-

established precedent. Second, the Petitioner argues that the present claim was acquired by the Petitioner through a confirmed plan and that, pursuant to 11 U.S.C. § 1123, Tennessee law can not impair such an assignment. This argument conveniently ignores the fact that the malpractice claim was not transferred to the Petitioner through a confirmed Chapter 11 plan.

While all property of the debtor does become property of the estate, 11 U.S.C. § 363 grants the trustee of the estate the authority to sell or dispose of estate property "[only] if the debtors would have had the same right under state law." *In re Schauer*, 835 F.2d 1222, 1225 (8th Cir. 1987). Under this well-recognized principle, the bankruptcy estate simply stands in the stead of the debtor, acquiring the rights in property previously enjoyed by the debtor and subject to the same limitations that would have applied to the debtor under state law. *See In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2nd Cir. 1989); *In re Draughon Training College & Institute, Inc.*, 119 B.R. 927, 933 (Bankr. W.D. La. 1990). The Bankruptcy Code "was written with the expectation that it would be applied in the context of state law and that federal courts are not licensed to disregard interests created by state law when that course is not clearly required to effectuate federal interests." *In re Roach*, 824 F.2d 1370, 1374 (3rd Cir. 1987). If state law restricts a debtor's ability to dispose of an asset, therefore, the bankruptcy estate is similarly restricted in disposing of the asset pursuant to 11 U.S.C. § 363.

The Tennessee Supreme Court's holding in this case is entirely consistent with the holding of federal courts that have considered similar issues. For example, the case of *Integrated Solutions, Inc. v. Service Support Specialities*, 193 B.R. 722 (Bankr. D.N.J. 1996) is directly on point. In that case, the plaintiff had purchased the assets of a bankruptcy debtor, including all pre-petition claims and causes of action. The

plaintiff then brought suit on various tort actions that had accrued to the debtor under New Jersey law. The defendant moved for summary judgment, arguing that because New Jersey law prohibited the assignment of tort claims, the bankruptcy trustee's transfer of those claims was invalid. In response, the plaintiff/assignee asserted that applying the state law restrictions on the assignability of the tort claims "would compel a trustee to litigate or abandon all claims, arguably frustrating the Bankruptcy Code's pervading policy — the expeditious liquidation of the estate." *Id.* at 727.

The Bankruptcy Court rejected this argument, holding that, although the bankruptcy trustee acquired the causes of action as property of the estate, the claims were still subject to the restrictions on assignment imposed by New Jersey law. *Id.* at 729. The court noted that 11 U.S.C. § 363(b)(1) did not expressly authorize the trustee to sell property in a way which violated applicable state law transfer restrictions. The court observed that, in those instances in the Bankruptcy Code in which Congress intended to displace such state law, Congress employed specific language to that effect. *Id.* Thus, the court held that "New Jersey's limitation on the assignability of tort causes of action defines and qualifies the scope of a proprietary interest. Since New Jersey public policy restricted [the debtor's] power to alienate its tort causes of action, the nature of the interests that passed to the estate pursuant to § 541 was similarly circumscribed" *Id.*

The *Integrated Solutions* holding is consistent with the Eighth Circuit's holding in *In re Schauer*, 835 F.2d 1222 (8th Cir. 1987). In that case, the bankruptcy trustee argued that "federal bankruptcy law preempts state law and thus the trustee's power to transfer property of [a] federal bankruptcy estate may not be restricted by state law or contract law." *Id.* at 1224. The Eighth Circuit found this argument to lack merit, because there was no

conflict between 11 U.S.C. § 363(b)(1) and those state laws that define the debtor's rights in property. Section 363 is simply an enabling statute giving the trustee the authority to sell or dispose of property "if the debtors would have had the same right under state law." *Id.* at 1225. *See also In re Professional Bar Co.*, 537 F.2d 339, 340 (9th Cir. 1976) (holding that the trustee of a bankruptcy estate takes property subject to the same restrictions applicable before bankruptcy).

In the present case, the Petitioner argues that the Tennessee Supreme Court's holding conflicts with the holding of the Fourth Circuit in *In re FCX, Inc.*, 853 F.2d 1149 (4th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). In fact, however, the *FCX* decision is entirely consistent with the result in this case. The *FCX* court held that, when an asset is disposed of pursuant to 11 U.S.C. § 1123, in some instances the trustee can dispose of the asset without regard to state law restrictions on the transfer. According to the court, § 1123, unlike § 363, is an "empowering statute" granting the trustee broader powers to dispose of property. *Id.* at 1155 Thus, the *FCX* court specifically distinguished a property transfer made pursuant to § 363 from a transfer made pursuant to § 1123.

The distinction between *FCX* and the present case is readily apparent. Contrary to the Petitioner's argument, the legal malpractice claim in the present case was not transferred through the confirmed plan pursuant to the provisions of 11 U.S.C. § 1123. Mr. Holder's confirmed plan contains no reference whatsoever to the malpractice claim. (Petition at Appendix 18-38). The trustee's transfer of the legal malpractice claim was accomplished, not through the plan, but by means of an agreed order resolving disputes among various parties. (Petition at Appendix 42-53). This order was entered after the plan had been confirmed and was entirely distinct from the plan. Thus, this case does not present an issue of what limits state law may impose on the distribution of assets through a confirmed bankruptcy plan.

The Tennessee Supreme Court's opinion contains no discussion of or holdings concerning the issues now raised by the Petitioner, who failed to raise those questions in the Tennessee courts. Even adopting the generous interpretation of the lower court's decision urged by the Petitioner, however, that decision simply does not conflict with any federal law. The Petition should be denied.

III.

BECAUSE THE DECISION OF THE TENNESSEE SUPREME COURT DID NOT DIRECTLY INVALIDATE ANY ORDER OF A FEDERAL COURT, THIS CASE DOES NOT PRESENT AN ISSUE CONCERNING THE FULL FAITH AND CREDIT TO BE AFFORDED THE JUDGMENTS OF FEDERAL COURTS.

The petitioner asserts that the Tennessee Supreme Court's decision in this case failed to accord full faith and credit to an order of a federal court. (Petition at 12-13). In fact, however, the Tennessee Supreme Court's opinion does not directly invalidate or call into question the order of the Bankruptcy Court purporting to assign the malpractice claim. As set forth above, the bankruptcy estate succeeded only to those rights formerly possessed by the debtor. The Bankruptcy Court's assignment did not explicitly address the issue of whether Tennessee law prohibited a transfer of the malpractice claim. Although the Tennessee Supreme Court's decision had an indirect effect on the ultimate effectiveness of the Bankruptcy Court order, such an indirect impact does not give rise to a Constitutional issue of sufficient importance to justify review by this Court.

Moreover, it is questionable whether or not the present Respondents would have had standing to appeal the Bankruptcy Court's order assigning the Petitioner's malpractice claim. *See*

Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3rd Cir. 1995) (quoting *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983)) (holding that right to appeal bankruptcy order limited to those whose interests are "directly affected"). In fact, when confronted with facts strikingly similar to the present case, one court concluded that the risk of being named as a defendant at some future date by an assignee of a debtor's tort claim would not be enough to give the potential defendant standing to challenge the assignment. *Integrated Solutions, Inc. v. Service Support Specialties*, 193 BR 722, 726 (Bankr. D.N.J. 1996). Because the Respondents likely would have been unable to challenge the assignment in Bankruptcy Court, the present case is the proper forum in which to decide the issue of whether the assignment was allowable under Tennessee law. The Bankruptcy Court never decided that issue, and the Tennessee Supreme Court's decision does not directly disturb any action of the Bankruptcy Court.

IV.

BECAUSE DUE PROCESS DOES NOT PROHIBIT A STATE SUPREME COURT FROM RETROSPECTIVELY APPLYING A NEW RULE OF COMMON LAW, THE PETITIONER'S ARGUMENT IN THAT REGARD SHOULD BE REJECTED.

The Petitioner asserts that the Tennessee Supreme Court's holding that legal malpractice cases cannot be assigned violated the Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution. It is not surprising that the Petitioner fails to cite any authority for the novel proposition that a state high court cannot change state common law and apply it to the case in which the change is announced.

The case law on retrospectivity and due process lends absolutely no support to the Petitioner's argument. The Due

Process Clause prohibits retrospective legal holdings or legislation only in those rare cases where the consequences are particularly "harsh and oppressive." *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (citing *Welch v. Henry*, 305 U.S. 134, 147 (1938)). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (stating that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations"). In order to be unconstitutional, a retrospective law or legal holding must be "wholly unexpected" and "disruptive." *See In re U.S. Financial, Inc.*, 594 F.2d 1275, 1281 (9th Cir. 1979). In the present case, the Tennessee Supreme Court decided a case of first impression in accordance with the rule observed in a majority of jurisdictions. (Petition at Appendix 70). The court's holding was hardly "unexpected" or unforeseeable.

It would be particularly inappropriate to find a state supreme court's holding unconstitutional in an instance where, as in the present case, the state court is deciding an issue of pure state common law. Even in criminal cases, the United States Constitution does not prohibit retrospective application of new interpretations of state law. *See Camitsch v. Risley*, 705 F.2d 351, 355 (9th Cir. 1983). There is simply no authority supporting the Petitioner's extraordinarily broad interpretation of the Due Process Clause, and this Court should not grant review on that issue.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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